

*Index*  
*needs*  
*show cause*

BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	FINAL ORDER
NO. 27903-s41F BY HOLLY CREEK WATER	)	
USERS ASSOCIATION	)	

\* \* \* \* \*

The instant objections are controlled by a series of orders initiated by In re Brown, Dept. Order, 4/83. We do not suppose that the legislature intended that hearings embracing the reception of evidence be held where there is no factual dispute. Moreover, to deal with similarly situated applicants in dissimilar ways would be arbitrary and capricious, MCA 2-4-704(2)(f), unless there be a reasonable basis for differing treatment. Here we found no such basis, and as a matter of law, the instant objections state no cognizable claim. See generally, Intermountain Telephone & Power Co. v. Mid-Rivers Telephone, Inc., \_\_\_ Mont. \_\_\_. 39 St. Rep. 2226(1982), Adams v. Califano, 552 F. 2d 1 (1st Cir. 1977); Sampson v. Califano, 551 F. 2d 881 (1st Cir. 1977); Ruiz-Olan v. Secretary, Dept. of Health, Education and Welfare, 511 F. 2d 1056 (1st Cir. 1975), Cooper v. NTSD, 546 F. 2d 870 (10th Cir. 1976), Michigan Wisconsin Pipe Line Co. v. EPC, 520 F. 2d 84 (D.C. Cir. 1975), NLRB v. J.C. Penney Co., 559 F. 2d 373 (5th Cir. 1977), Indiana Harbor Belt RR. Co. v. General Am. Transportation Corp., 577 F. 2d 394 (7th Cir. 1978), Hilt Truck Line, Inc. v. United States, 548 F. 2d 214 (7th Cir. 1977) NRLB v. West Sand & Gravel Co., 612 F. 2d 1326 (6th Cir. 1979).

Montana Power Company also argues that such former dispositions can at most only be dispositive on the issues of "unappropriated water" and "adverse effect to prior appropriators." See MCA 85-2-311. Montana Power Company is correct. Beneficial use and adequacy of the diversion means are "site specific" to each Applicant. However, the instant objections do not appear to embrace these latter issues, nor do they "state facts" tending to show the absence of the same. See MCA 85-2-308(2).

More basically, we do not understand that an objector has any vested interest in such determinations if in fact and law there is no adverse effect to the water rights that are the focus on his claim. See generally, Carlson v. Helena, 39 Mont. 82, 102 P. 39(1909), Holmstrom Land Co. v. Meagher County Newlan Creek Water Dist., 36 St. Rep. 1403, 605 P. 2d 1060(1979), Horse Creek Conservation Dist. v. Lincoln Land Co., 54 Wyo. 320, 92 P. 2d 572(1939), Affolter v. Rough and Ready Irrigating Ditch Co., 60 Colo. 519, 154 P. 738(1916). This application states a purpose within the range of use that are ordinarily to be regarded as beneficial MCA 85-2-102(2), and whatever the measure of appropriation state on the permit, this Permittee may use no more water than is needed at any particular time. See Tucker v. Missoula Light & Water Co., 77 Mont. 91, 250 P. 11(1926) See also Quigley v. McIntosh, 110 Mont. 495, 102 P. 2d 1067(1940). While we appreciate Montana Power Company's invitation to perform as a private attorney general in these proceedings, we think that it is not too much to ask for some colorable claim. Particularly

is this so when by our own procedures Department personnel inspect each application for devotion to the statutory criteria, and do not file an objection on their own behalf, see MCA 85-2-310(2), and where there are no other persons claiming a hearing as of right. Mistakes may be made, but even if they are not corrected at the certificate stage, MCA 85-2-315, they form no lasting prejudice.

Wherefore, Application for Beneficial Water Use Permit No. 27903-s41F is hereby granted to Holly Creek Water Users Association to appropriate 1.5 cfs up to 46 acre-feet per year for new irrigation of 15.5 acres more or less comprised of .5 acres in the NE1/4 of Section 14 and 10 acres in the NE1/4 and 5 acres in the NW1/4 of Section 13, all in Township 7 South, Range 2 West, in Madison County. In no event shall these waters be diverted prior to May 1 of any given year nor subsequent to October 31 of any given year. In addition, the Permittee may withdraw and use 1.5 cfs up to 2.3 acres-feet per year for stockwatering purposes continuously throughout the year as needed. The source of supply shall be Holly Creek, the waters thereof to be diverted at a point or points in the SE1/4 SW1/4 SW1/4 of Section 11, Township 7 South, Range 2 West, all in Madison County. The priority date for this Permit shall be June 27, 1980, at 11:58 a.m.

This Permit is subject to the following express conditions, limitations, and restrictions.

A. Any rights evidenced herein are subject to all prior and existing rights, and to any final determination of such rights as

provided by Montana law. Nothing herein shall be construed to authorize the Permittee to divert water to the detriment of any senior appropriator.


B. The Permittee shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.


C. Nothing herein shall be construed to affect or otherwise reduce the Permittee's liability for damages which may be caused by the exercise of this Permit.

#### NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 25<sup>th</sup> day of April, 1984.

  
\_\_\_\_\_  
Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
32 S. Ewing, Helena, MT  
(406) 444 - 6605

  
\_\_\_\_\_  
Matt Williams, Hearing Examiner  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59620  
(406) 444 - 6704

AFFIDAVIT OF SERVICE  
FINAL ORDER

STATE OF MONTANA )  
 ) ss.  
County of Lewis & Clark )

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 25, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by HOLLY CREEK WATER USERS, Application No. 27903-s41F, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Holly Creek Water Users, c/o Jim Normand, Rt. 2, Box 165, Ennis, MT 59729
2. Bureau of Reclamation, P.O. Box 2553, Billings, MT 59103
3. US Dept. of Interior, P.O. box 1538, Billings, MT 59103
4. Montana Power Co., 40 East Broadway, Butte, MT 59701
5. K. Paul Stahl, Attorney, 301 First National Bank Bldg., P.O. Box 1715, Helena, MT 59624 *Hand deliver*
6. Scott Compton, Bozeman Field Office, (inter-departmental mail)
7. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Donna Elser

STATE OF MONTANA )  
 ) ss.  
County of Lewis & Clark )

On this 25<sup>th</sup> day of April, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Jim P. Gilman  
Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 1/21/1987